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## **ADR in Ireland and the US Model**

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## **ADR in Ireland and the US Model**

### **Abstract**

This paper examines whether organizations in Ireland are following their counterparts in the USA and adopting advanced ADR-inspired conflict management innovations. It finds that the pattern in Ireland is for organizations in the main to change conflict management practices in a reactive, piecemeal manner that seldom involves any proactive or strategic action. Another interesting development identified is of a small group of organizations that adopt an incremental and evolutionary approach to workplace conflict management innovation, which involves changing tried-and-tested conflict management practices pragmatically overtime. The paper suggests that apart from the USA all other Anglo-America countries more or less follow the pattern of workplace conflict change occurring in Ireland.

In the early-mid 2000s, an important new stream of literature, some of it normative, some of it descriptive, and some of it both, emerged on workplace conflict management in the USA. A key theme of this literature is that organizations in the USA are increasingly using a variety of ADR-inspired procedures and practices to address workplace problems (Bendersky 2007; Colvin 2003a; Lipsky, Seeber and Fincher 2003). This pioneering body of research inspired a large scale survey in Ireland in 2008 to examine the extent to which firms with 50 or more employees in the private and state-owned commercial sectors in the country were following the USA pattern and adopting ADR-inspired workplace conflict management practices (Teague, Roche and Hann 2012).

This survey showed that with the exception of formal open-door policies, few firms had adopted ADR practices for managing individual employment grievances and also revealed that the pattern of adoption tended to be largely random and unsystematic. The pattern in larger firms was little different to firms in general (Roche and Teague 2012; Teague et al. 2012). While US-owned multinational corporations were more likely to have adopted some ADR practices, such as 'hot-line' or 'speak up' services and organizational ombudsmen, they were less likely to have adopted other ADR practices, like using 'employee advocates' or bringing in external experts to resolve grievances (Teague et al. 2012: 597). A separate study of conflict management in (mainly US) non-union multinationals in Ireland also revealed little evidence that these firms adopted conflict management systems in their Irish subsidiaries (Doherty and Teague 2012).

The 2008 Irish survey also revealed that ADR practices for resolving collective conflict were more pronounced in Ireland than individual ADR practices, but most nevertheless remained features of minorities of firms and even of larger firms (Roche and Teague 2011: 445; Teague et al. 2012: 595). Latent class analysis revealed that an estimated 25 per cent of mainly non-union firms used sets of collective ADR practices that included ‘brainstorming’, problem-solving and associated techniques to solve problems and resolve disputes, as well interest-based bargaining and intensive formal communications regarding impending change. A further 5 per cent of mainly unionized firms combined these practices with conventional disputes procedures and used also external experts to promote early dispute resolution (Roche and Teague 2011: 447-52). There was little evidence that these clusters arose from deliberate proactive attempts to develop conflict management systems (albeit confined to group conflict). Thus, the 2008 Irish survey unambiguously showed that the adaption of ADR-inspired conflict management practices in Ireland was neither as widespread nor as transformational or systemic as the pattern that research was finding in the USA. But this stand-out finding begged a further series of important questions, mostly notably: if firms in Ireland were not diffusing ADR-inspired conflict management innovations, on the US model, did this mean that they were choosing to remain with tried-and-tested conflict management methods? Or was it the case that they were using alternative, yet to be uncovered, approaches to upgrade their workplace conflict management practices? To gain insights into these questions, the authors conducted a detailed empirical study of conflict management innovations in organizations in the private and public sectors in Ireland, the findings of which is reported in this paper.

### **Examining the Adoption of ADR Innovations: Research Methods**

A multi-method qualitative research design that collected data through interviews, focus groups and a series of case studies was adopted for the inquiry. The interviews were conducted with multiple stakeholders involved in the adoption and operation of ADR: managers, employer representatives, union officials and conflict resolution professionals. Interviews covered the genesis and development of ADR in organizations and were also used as a means of identifying potential case study organizations for intensive study. Communications were also conducted with 4 senior lawyers to examine whether, in their experience, in-house counsel played a role in conflict management innovations and their application. Included were two highly experienced senior employment lawyers with long and deep experience of employment grievances and disputes, including the use of ADR.

Generating a population of case study organizations was recognized to be a key feature of the research design and so was conducted in a highly systematic manner to ensure that the cases selected were representative of the spectrum of ADR innovations evident in Ireland. Case studies were selected for study from a population list of all known instances where organizations had introduced ADR practices. The population list was compiled from a series of sources. These included cases identified in focus groups and other interviews, reports in specialist industrial relations publications (in particular the weekly publication *Industrial Relations News*, IRN), other media and press reports and cases presented at HR and industrial relations conferences. Discussions with conflict resolution professionals were also undertaken to identify cases. The list was stratified by the types of innovation(s)

involved, providing sub-lists of cases of mediation, assisted bargaining, proactive line management involvement and instances involving multiple ADR innovations.

Case studies were then chosen for intensive research from this stratified list based on a combination of ensuring as wide as possible a spectrum of sectors and organizations and achieving access to the required data. A series of stakeholder interviews were conducted in association with the case studies and these were further supplemented by internal and publicly available information on case study organizations. Interview data were analyzed on the basis of the themes and issues presented to interviewees (focused on the genesis and nature of ADR innovations) in semi-structured interview questionnaires (individual interviews and case study interviews) and in power point overviews of interview themes (focus group interviews). Focus groups and interviews were recorded and transcribed for analysis. Case study data were analyzed using the classical ‘triangulation’ methodology, combining case study interviews with external and internal data on the organizations involved. The data collected in the study, which involves one of the largest and most diverse studies of the adoption of ADR in the literature to date, is summarized in Table 1.

[Insert Table 1 here]

### **Routes to Workplace Conflict Innovation in Ireland**

Interviews with Dublin-based and regional officers of the main employers’ confederation active in employment relations, the Irish Business and Employers’ Confederation, revealed that they were aware of no instances of integrated conflict management systems in Ireland,

not alone in Irish organizations but also in the Irish subsidiaries of multinational firms. Interviews with management respondents established that organizations mostly adopt a reactive and ad hoc approach to workplace conflict innovation in Ireland. Established conflict management arrangements only get revised when the need to do so becomes apparent. Thus, for example, organizations may adopt some form of mediation in an attempt to reduce the time and costs associated with resolving some forms of conflict, or when it is recognized that established conflict management practices are not particularly suited to addressing the increasing incidence of individualized, relationship-based problems. Changes in employment legislation and associated regulatory codes of practice, particularly in the areas of bullying and harassment, were also influential in leading some organizations to make provision for the use of mediation. When introducing conflict management innovations the emphasis was usually placed on identifying a method of change that does not overly disrupt established conflict management practices.

When asked to discuss their approach to innovative workplace conflict management policies, it was evident that most participants in the HR focus group were uneasy using the vocabulary of innovation. In many instances the reluctance to speak in terms of innovation to describe how conflict management practices were revised, updated or adopted hints at the absence of a fully-fledged strategic approach to managing problems at work. One participant said: ‘So there is an issue about innovation, is it a long process? Have we the time to do it? Does it actually work? Are we prepared to try this? ... A lot of the time we are learning from previous innovations that we tried.’ Another commented: ‘innovation is



great as long as it doesn't turn into time-wasting, or a tool to prevent you from implementing something.'

Few participants said that they engaged in any type of comprehensive strategic reflection on workplace conflict policies – what they were doing and why they were doing it, whether there was a need to improve established practices and in what ways. Few also engaged in a benchmarking exercise to compare how they went about addressing workplace problems with how others approached the matter. With most participants reluctant to articulate their efforts at revising or changing workplace conflict practices, in terms of the language of innovation, it is not surprising that no participants reported their organizations diffusing integrated bundles of ADR-inspired workplace conflict practices. Few suggested that they had even considered the merits of these practices in any detail.

The approach to changing conflict management practices evident in the case of HR focus group participants was mirrored in the case of mediators and facilitators engaged by organizations to resolve individual or collective conflict. One commented that the pattern of innovation was based on a 'kind of intuitive conclusion' commonly adhered to by HR managers that:

*Ad hoc* bits of innovation every now and then, when the proverbial hits the fan, is going to be just as effective and possibly cheaper than putting in some kind of very complex and comprehensive set of arrangements that are not just costly but perhaps risky and might be associated with [your] own

reputation as a driver of innovation, in terms of whether these things work or not....

Mediators and facilitators highlighted that it could be hard to make the case for ADR innovation in the absence of metrics showing that these practices delivered bottom-line benefits:

I think in terms of adoption, my sense is that the evidence isn't there.... The evidence isn't there in Ireland that taking the time and money to put all of these kinds of arrangements in place is actually going to pay off, you know.

Experienced state agency facilitators and mediators were inherently cautious about the claims associated with the more elaborate ADR models, viewing these as unconvincing and largely untested. They also questioned whether other innovations, such as 'interest-based bargaining', were new at all. They saw mediation as potentially highly resource- and time-intensive and posing challenges for state agencies concerned to deploy scarce resources to deliver value for public money.

Union officials in general adopted a pragmatic approach to innovations in grievance resolution that involved mediators, or occasionally, arbitrators. These developments were welcome in so far as they removed the burden from union officials of becoming involved in contentious conflicts that sometimes involved two union members locked in disagreement. At the same time, they also remained ambivalent about these ADR innovations because they reduced the role of unions in grievance handling. The use of external facilitators in collective bargaining was welcome by most on pragmatic grounds

and where unions were directly involved in the choice of facilitators. Unions were only very occasionally involved in the design and introduction of ADR innovations.

Thus, the most common pattern was for organizations to adopt an improvised and ad hoc approach to the revision of conflict management practices that seldom involved any proactive involvement of stakeholders. Two exceptions were identified where organizations for different reasons and in different ways could be said to have adopted a strategic approach to conflict management. The first involved the Irish subsidiary of the global chip manufacturer, Intel, where a commitment-based HR strategy, allied to a union substitution voice strategy resulted in the addition of 'employee advocates' to an open-door policy. Later, when this innovation was deemed to have disempowered line managers, the company created a so-called 'dual focus' model in which the HR function provided support and advice to both managers and employees involved in employment grievances. The second was Irish Central Bank, where a profound organizational crisis following the near collapse of the Irish financial system in 2008, led the organization and its unions to agree a new industrial relations model based on problem solving and co-operation, coupled with an internal collective dispute resolution tribunal. The bank and unions subsequently agreed to adopt mediation for individual employment grievances and arbitration for unresolved differences over performance ratings. In neither the Intel nor the Central Bank case had more strategic approaches to conflict management led to the creation of integrated conflict management systems.

Besides reactive and strategic approaches, our research also uncovered an alternative approach to workplace conflict management innovations. We found a group of firms standing apart from these two fairly well articulated approaches by adopting what may be called an incremental or evolutionary pathway to workplace conflict management innovation. HR managers in these organizations were unaware or unpersuaded by the prescriptive account of introducing conflict management changes by rational design. They viewed extensive changes to conflict management arrangements as unwarranted, partly because workplace problems were considered to be more or less under control and partly because they were unconvinced of 'silver bullet' solutions to managing conflict inside their organizations.

Although unaware or unconvinced about the merits of building ADR-based conflict management systems, these HR managers should not be viewed as ad hoc improvisers. HR managers in organizations that pursued an incremental and evolutionary approach to conflict management change had a keener appreciation that workplace conflict, or the environment in which it arose, did not stay the same, and as a result that workplace conflict management practices should not be viewed as immutable. HR managers adopting an evolutionary stance were willing to make ongoing adjustments to conflict management practices and to further modify these based on experience.

Thus those adopting an evolutionary approach tended to be less tied than improvisers to established conflict management practices. Equally, when an innovation proved to be effective those that adopted an evolutionary approach were prepared to make further

changes to extend and embed the new arrangements and even adopt additional augmenting changes. This evolutionary innovation pathway may be insufficient to trigger transformative change to conflict management systems, but it suggests that these organizations have the capacity to learn from what works, monitor the degree to which changes to conflict management practices are effective, and are prepared to scale up, or least build upon, innovations. Organizations adopting an evolutionary approach to conflict management innovation identify and seek to improve on initially piecemeal innovations, but they may also dispense with ADR innovations where they fail to meet expectations or create unanticipated problems. External mediators or facilitators sometimes see themselves as playing significant roles as catalysts of this kind of innovation. One participant from the focus group of mediators and facilitators commented:

Certainly in a lot of the cases I'm brought into are reactionary or crisis driven. There is space for innovative intervention, but it tends to be discrete interventions [pertaining] to a particular situation which organizations haven't been able to manage themselves. So, you go in and you look at policies and procedures. You look at the situation at hand and then devise a process for managing it. There would generally be opportunities to feed back in, make general recommendations, as well, such as how this type of situation might not arise again.

A HR manager identified a similar dynamic when describing an effort to depart beyond adversarial employment relations towards co-operation with unions in the context of a restructuring plan:

It was the first local agreement in 25 years. Surely by listening and engaging with the ideas of people on the floor, sometimes they're better than management ideas was kind of the point. I think that level of engagement opened a whole new door and moved that facility from being a place of very old style industrial relations.... That's a phenomenal shift in my view simply done by working with them on the problem at hand.... It's hard to write down what you do, 1, 2, 3 but it does work. There's greater engagement; a kind of trust builds.

While HR managers, mediators and facilitators focused in the main on internal organizational reasons for adopting an evolutionary approach to innovation, they also indicated that the external institutional environment made a contribution. The ready availability of the services of the state conflict resolution agencies, at no direct cost to users, was widely seen as reducing the need for radical innovation within organizations. As acknowledged within the mediator/ facilitator focus group, making the change from behavior embedded within conventional procedures was seen as extremely difficult 'especially when it is supported by an entire formal system that is telling you otherwise'.

A mediator/facilitator commented further:

As long as the State is going to declare itself as having set up a whole process, systemizing conflict resolution, employers are not going to invest in it themselves.

### **The Evolutionary Route in Practice: Case Studies**

The incremental or evolutionary approach to introducing ADR is little discussed in the international literature. To gain more insight into this path, we focus on three case studies of organizations that adopt it in different ways: a US-owned multinational services firm, Aramark, an ICT firm, Eircom (since rebranded as eir), and an Irish-owned multinational food distributor and retailer, Musgrave.<sup>1</sup>

The genesis of the evolutionary approach at Aramark Ireland was the adoption of a stand-alone mediation programme for the Irish subsidiary in response to changes in employment law governing dignity and respect at work. The mediation programme was subsequently extended to other employment grievances, aligned with corporate HR strategy and identified for wider diffusion across the multinational. Proclaiming a commitment in its international operations to best-practice HR and CSR, Aramark adopted the mediation process pioneered in its Irish subsidiary as part of a corporate-wide approach to conflict management, known as '*One Aramark*'. As a senior manager said, '*One Aramark* means we've one way of doing things so regardless of where employees sit we manage them in the same way. Mediation is provided to our employees regardless of where they work, recognition is applied to all our employees regardless of where they work. So that's a journey that we're on.' In the Aramark case, an initially ad hoc and reactive posture, involving the confined introduction of mediation, was broadened incrementally into a general mediation program that was then found post hoc to align with wider HR and organizational goals across the parent firm.

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<sup>1</sup> Full case studies of each organization are available from the authors on request.

The ICT firm, Eircom (since rebranded as 'eir'), provides a further instance of the evolutionary approach to workplace conflict management change. In this case again mediation was adopted in response to the same external regulatory change as in the case of Aramark. However, it was then adapted to become one of a suite of HR policies devised to handle the firm's transition from a public service bureaucracy with strong trade unions to a listed commercial organization with both unionized and increasingly non-union staff. Mediation came to be regarded by some in senior management as a means of symbolizing and prioritizing the individualization of employment relations and as a way of promoting the adoption of common HR practices across the firm's divisions and workforce: one manager suggested that strengthening and enlarging the role of mediation in the organization was 'really the formalization of practices that have grown but at the core of our approach is that we see employees as individuals. If you keep going back to that fundamental principle and you treat them that way you can find solutions.' While mediation was not formally enshrined in joint employer-union grievance procedures, the practice was transformed from being a stand-alone policy to one that dovetailed with other policies designed to recast HR as the firm sought to decollectivize employment relations and promote individualized terms and conditions of employment and grievance resolution. As in the case of Aramark, an initially reactive and ad hoc change to conflict management practices, came to be understood post hoc as aligning well with wider HR objectives in a firm determined to shake off its public sector legacy in an increasingly competitive ICT market.



The Irish multinational food distributor and retailer, Musgrave, provides another case of the evolutionary approach. Traditionally the company pursued organizational change through negotiations with trade unions. But senior managers became dissatisfied that these collective employment relations processes were not delivering the pace of change required to keep up with the increasing competitiveness of the retail market. The market had been transformed during the Irish economic crisis when low- cost European retailers, especially Aldi and Lidl, increased their market share and patterns of consumer behavior shifted to what Musgrave called 'modest shopping'.

To respond to this situation the company introduced an employee engagement strategy that increased the role of line management in the organization. Very quickly line management involvement in grievance resolution increased significantly. As a result, the company experienced a growth of informal conflict management activity as line managers began identifying and resolving work problems. This tilt towards informal problem solving led the firm to develop a range of new formal conflict management procedures designed to improve the problem-solving abilities of line managers. Line managers became involved for the first time in 'start-up meetings' when shifts changed, monthly 'huddles' where they updated their teams on their priorities and objectives, regular 'one-to-one' meetings with their reports and other problem-solving and trouble-shooting practices. According to a senior HR manager, each line manager was expected now also to be a team leader, who would 'know the team members individually; sitting with them doing their appraisals etc.' At the same time, line managers also became increasingly involved in identifying potential problems and resolving such grievances as did arise.

A senior operations manager says of the line managers that they have ‘worked with their teams building up the level of trust; we talk about conflict resolution, obviously we have conflict within the depot, obviously there are issues that arise but in the main we’re almost at a point of conflict avoidance.’ This tilt towards informal problem solving spilled over onto the organization’s formal conflict management procedures. In particular, senior managers realized that line managers had to receive more comprehensive training to upgrade their problem-solving and that the HR function needed to monitor actively whether informal conflict management was being conducted more or less the same way across the organization. Thus, conflict management changed significantly in the organization: informal conflict was widespread, but for the first time line managers were involved in problem solving. A spillover dynamic was evident whereby a change unrelated directly to conflict management had the effect of triggering quite significant yet incremental change to the way conflict was addressed in the organization. This case shows that the evolving experience of a new conflict management practice may trigger additional changes to how problems are solved in the organization.

### **The Institutional Context of ADR Innovations in Ireland**

Just why integrated, ADR-inspired conflict management systems have not been diffused in any systematic manner in Ireland is probably most convincingly explained by institutional features of the Irish system of conflict resolution that do not encourage radical shifts towards conflict management systems in organizations otherwise amenable to introducing ADR innovations.

***The legal context of conflict resolution:*** The legal context of conflict resolution in Ireland, and other Anglo-American countries, is framed by a common law system shared with the US. But the presence of special agencies in Ireland (and in other Anglo-American countries) charged with resolving employment grievances has a decisive influence on how disputes that leak outside the workplace are settled. In 2016 230 employment cases were heard in the civil courts, while 6,863 complaints were filed with the state conflict resolution agency, the Workplace Relations Commission (WRC) – representing a ratio of 30:1 (Courts Service 2016; Workplace Relations Commission 2016). This agency, with onward referral of appeals to a Labour Court, is widely used by employees seeking to vindicate an expanding body of employment rights and can be accessed free of charge. It is a standard feature of Irish employment law that employers cannot lawfully require employees to abandon their right to access these institutions; nor can employees voluntarily waive their right to access these services.<sup>2</sup>

[Table 2 here]

Table 2 shows that three quarters of employment grievances heard at the Workplace Relations Commission are disposed of in less than six months. In Ireland damages that can be awarded by the WRC or the Labour Court under major employment laws are limited by statute. Mean awards in 2015 amounted to \$18,320 in unfair dismissals cases and \$25,877

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<sup>2</sup> Section 13 of the Unfair Dismissals Act 1977 set the template for subsequent employment laws: ‘A provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of this Act) shall be void in so far as it purports to exclude or limit the application of, or is inconsistent with, any provision of this Act.’

in equality cases. The maximum award in an equality case was €81,000. These awards contrast sharply with median damages in employment litigation in the US. These range from \$147,000 in state courts to \$330,000 in federal courts (Colvin 2012). Thus, the financial incentives that exist in the US for employers to develop internal conflict management systems to lock complainants into conflict resolution within the organization, and so avoid the prospect of long delays, large damages and heavy costs, do not exist to anything like the same extent in Ireland.

***Conflict resolution agencies and actors:*** While there has been considerable innovation *within* the state conflict resolution agencies, involving the provision of mediation, early resolution and facilitation services, the WRC and other agencies have not played a proactive role in animating the adoption of ADR within organizations. The focus groups conducted as part of this study uncovered considerable skepticism in the LRC/WRC towards some prevailing organizational-level ADR innovations, reporting that the state body was sometimes faced with picking up the pieces when these had been ineffective or had backfired. The Labour Court has confined its own use of ADR to ad hoc exercises in facilitation in a small number of disputes. While the Court sometimes admonishes employers and unions to improve industrial relations, it has avoided offering any prescriptive templates for how this might be accomplished. Few prescriptive programmes even for the incremental adoption of conflict management systems, has emerged from Ireland's conflict resolution agencies (Robinson, Pearlstein and Mayer 2005).

Private practitioners providing collective or individual ADR might also be expected to act as advocates for the adoption conflict management systems. Facilitators and mediators tend however towards eclecticism in their methods and operate on a project basis in their work. Private collective facilitators, whose numbers have grown significantly over the past decade in Ireland, use both interest-based and rights-based options in their work, but the approach they and their interlocutors adopt is determined by the circumstances of the cases addressed and their work typically does not lead to revised workplace dispute resolution procedures (Roche 2015). The numbers of mediators offering workplace grievance resolution services has expanded even more significantly, and workplace mediators now form a significant community within the professional mediators' body, the Mediators' Institute of Ireland (MII). Thus far, the MII and its workplace mediation members have focused on establishing professional codes and standards and on certifying and providing mediation training. Like their colleagues offering collective ADR, mediators tend to work on a project basis and have little proactive involvement in the design or revision of workplace conflict management procedures (Kenny 2018). While the professional communities of collective and individual mediators have thus grown significantly in Ireland, no 'best practice' advocacy of conflict management systems like that of the (former) Society of Professionals in Conflict Resolution in the US has emerged in Ireland to animate changes in workplace conflict resolution (Society of Professionals in Conflict Resolution 2001).

***Instigators of ADR in Workplaces:*** Corporate counsel occupy a pivotal role in conflict management systems within firms in the US. This reflects both the provenance of

workplace ADR within general purpose conflict management systems and the highly litigious nature of US society (Lipsky et al. 2003). Table 3 provides standard indicators of the comparative litigation rates and numbers of lawyers in Anglo-American countries. While the data need to be treated with caution, the comparisons nevertheless confirm that the US is an ‘outlier’ in terms of civil suits filed per 100,000 people. Levels of litigation vary among other Anglo-American countries, but all fall considerably behind the US. A 2:1 litigation ratio separates the US and Ireland. Ireland does emerge as a relatively highly ‘lawyered’ country, but, as was seen above, in practice little employment law falls within the ambit of the civil courts.

[Table 3 here]

In-house counsel are common in Ireland in large firms and public service organizations. Our research communications with senior lawyers indicated that in their experience in-house counsel play little proactive role in the adoption or operation of workplace ADR, or in the design of procedures for resolving workplace conflict. In practice lawyers within firms act as conduits to lawyers working for external law firms. In none of the focus groups, interviews or case studies undertaken in conjunction with this study were in-house counsel found to have played any significant part in the roll-out or development of ADR. The Mediation Act 2017, which seeks to encourage the wider use of ADR in legal disputes in Ireland, obliges in-house counsel, like all lawyers, to advise their clients (firms) on the availability and possible advantages of ADR. Following precedent, disputes within the purview of the Workplace Relations Commission are excluded from the scope of the Act.

It seems unlikely therefore that in-house counsel will feel obliged to advise firms to offer mediation or facilitation in disputes covered by standard procedures that make provision for onward referral of unresolved conflict to the Workplace Relations Commission – although such an outcome cannot be discounted in non-union firms where procedures typically contain no such external step.

### **The Irish evidence in comparative perspective**

Thus, the evidence from Ireland is that organizations do not regard ADR-inspired conflict management practices as the optimal method of addressing workplace problems. Moreover, they do not face significant institutional pressures to transform workplace conflict management through introducing integrated sets of ADR-inspired practices. A pragmatic approach tends to prevail that mostly involves firms molding conflict management practices to fit with idiosyncratic organizational circumstances. An interesting question that arises from this finding is whether the diffusion of innovative conflict management practices in other Anglo-American countries approximates to the Irish experience. With regard to the UK, while directly comparable data are not available, research points to a similar pattern to that in the Irish data. The growing use of mediation to resolve individual grievances by organizations in the UK has attracted most attention and has generated a significant corpus of research. This reveals that firms and public service organizations continue to resort to mediation on a largely ad hoc basis. The all-encompassing proactive decision-making posited by the strategic paradigm is seldom in evidence. Nor are the conflict management systems associated with the strategic paradigm

(Latreille 2011; Wood, Saundry and Latreille 2014). In some instances mediation initiatives appear to have evolved into ‘more systemic approaches’ to conflict resolution (Latreille 2011: 63-4). Isolated cases of diffusing innovative sets of conflict management practices, conflict management systems in all but name, have been reported in the UK, such as in the case of a large National Health Service unit, providing hospital, community health and adult social care, where the initiative was undertaken incrementally in an evolutionary manner but ultimately as a means of promoting ‘cultural transformation’ in the context of growing work pressures faced by staff (Latreille and Saundry 2016).

A survey of private sector firms with head offices in Wales shows the wide prevalence of mediation for resolving individual and collective conflict and conflict between employees, with about three out of ten employers using these various forms of mediation (Hann, Nash and Heery 2016: 12). Other ADR practices show a broadly similar prevalence to Ireland, with a higher prevalence of review panels and employee advocates for addressing individual conflict and of formal communication about impending change for handling group conflict (compare Hann et al. 2016: 14-17 with Teague et al. 2012: 592-595). The Welsh study includes ‘conflict coaching’ and ‘personal development planning’ among the ADR practices assessed, and these are shown to have a high prevalence, being present respectively in 55 per cent and 35 per cent of firms (Hann et al. 2016: 16). Hann et al. (2016: 15) interpret their findings as showing an appreciably higher prevalence of ADR in Wales than is commonly supposed for the UK or Ireland, and, somewhat tentatively, as pointing towards the ‘potential development of integrated [conflict] management systems’. However, the average number of ADR practices prevalent out of a list of 14 that was



assessed was between 3 and 4 – hardly indicative of the prevalence of conflict management systems (see Hann et al. 2016: 9 and 20).

Much the same pattern seems to be case across the Pacific in Australia and New Zealand, although again the absence of comprehensive or cross-nationally comparable data precludes any definitive assessment. Research reviews of ADR in both countries tend to be agency-centric rather than firm-centric, reflecting a pattern in which ADR innovations have tended to be top-down in genesis, or fostered by state conflict resolution agencies, rather than bottom-up, or emerging organically within firms. The most detailed reviews of developments in Australia and New Zealand point towards, at best, limited engagement by firms with ADR. Van Gramberg, Bamber, Teicher and Cooper (2014) and Van Gramberg, Teicher and Bamber (2016) show that a series of political and legislative attempts to promote private mediation in collective disputes made little headway in Australia. Reviews of developments in conflict involving individual employees have focused on the sharp rise in grievances and in ‘self-represented litigants’ at the Fair Work Commission (FWC).

The FWC has responded by expanding mediation and conciliation and by developing various communication and preventive initiatives (Van Gramberg et al. 2016). Beyond these developments, Other than the odd exception (see Hamberger 2012) Australian commentaries highlight few innovations of a systemic character within the grievances or dispute resolution procedures of firms. Much the same can be said in the case of New Zealand. Here collective ADR remains unusual (Rasmussen and Greenwood 2014). As in Australia, state conflict resolution agencies have grappled with how best to address a sharp

rise in the incidence of individual employment grievances. A Mediation Service has been established to encourage grievance resolution prior to adjudication or arbitration by the Employment Relations Authority. Other than in the case of bullying and harassment, where the search for ADR practices within firms has been commented upon (Rasmussen and Greenwood 2014: 467), innovation appears to have been weighted towards services provided by state conflict resolution agencies.

Thus, the comparative evidence seems to suggest that the Irish pattern of limited diffusion of ADR-inspired conflict management innovations is more or less being replicated in other Anglo-American countries, apart from the USA. Moreover, just like Ireland strong institutional incentives to adopt ADR-based conflict management systems have not emerged in any Anglo-American country other than the USA (Colvin and Darbishire 2013; Currie and Teague 2016). Attempts have been made to introduce, through top-down political intervention, thorough-going reform of workplace conflict systems, but with limited success. In New Zealand, an extensive transformation of existing institutional support systems for collective industrial relations was attempted through the Employment Contracts Act 1991. This piece of legislation was a radical plan to weaken collective industrial relations and create a new institutional structure for individual employment disputes, with a strong emphasis on non-judicial resolution methods such as mediation (Walker and Hamilton 2009). Unsurprisingly, trade unions strongly opposed this development, claiming it represented a ‘privatization’ of the dispute resolution system. As a result, when a Labour Government regained power it passed the Employment Relations

Act 2000 to shift the balance back towards collective bargaining and away from individual employment rights (Waldegrave, Anderson and Wong 2003).

In Australia, several pieces of legislation were introduced to weaken a lynchpin of the country's collective industrial relations system, the centralized conciliation and arbitration system that strongly regulated aspects of organizational wage setting. In addition, an Alternative Dispute Resolution Assistance Scheme (ADRAS) was introduced to strengthen the role of private mediation in the management of workplace conflict by providing employees with financial subsidies to use private mediators instead of statutory bodies to address their employment grievances/disputes. In effect, public policy was being used to promote a private justice regime to resolve legally-based workplace conflict (Van Gramberg 2006). The new regime was stoutly opposed by trade unions and some politicians, which explains why one of the first moves of a new Labour Government elected in 2008 was to introduce the Fair Work Act 2009, which aimed at re-establishing public support mechanisms for collective bargaining.

Thus attempts at moving Australia and New Zealand down a pathway similar to that being travelled in the USA were thwarted. Continued widespread electoral support for social democratic parties, alongside trade unions remaining influential, blocked radical change to workplace conflict management regimes in both countries. Other Anglo-American countries have not experienced any concerted efforts to privatize or recast the resolution of workplace conflict management along lines emerging in the USA. In the UK, the public policy debate on workplace conflict has very much focused on the efficacy of Employment

Tribunals in dealing (mostly) with individual employment disputes. Various government-sponsored reports have portrayed employment tribunals as being overly formalistic, legalistic and cumbersome and as a result almost not fit-for-purpose (see for example Gibbons 2007). The main state dispute resolution body, ACAS, has responded to this development by promoting conciliation and mediation as a method for resolving workplace disputes. But there is no evidence that organizations are moving in any decisive way to ADR-inspired workplace conflict management innovations (Wood et al. 2014).

In Canada, various public employment dispute resolution agencies at federal and provincial level have sought to reorient what they do by increasing the number of informal, non-judicial dispute resolution services they deliver. Most of these concern the development of some type of ADR initiative to encourage the settlement of (mostly) individual-based workplace disputes informally. But as in the Irish case, these initiatives are aimed at making modest adjustments to tried-and-tested conflict management policies. An interesting initiative was introduced by the Public Service Relations Board in the early 2000s to diffuse a set of interrelated ADR procedures across the public sector, but after an initial flurry of activity this initiative petered out (Thompson and Slinn 2013).

Thus, although all Anglo-American countries have experienced a weakening of collective industrial relations, the established institutional frameworks for addressing workplace disputes and grievances have not been recast in any fundamental way. Few institutional incentives have emerged encouraging the diffusion of ADR-based conflict management

systems have emerged in any coherent form in other parts of the Anglo-American world apart from the USA.

### **ADR-Inspired Conflict Management Practices as American Exceptionalism**

The upshot of this assessment is that the USA stands apart in terms of the significant organizational moves occurring towards the diffusion of sophisticated conflict management practices, whether these take the form of strategies, systems or significant single innovations. American exceptionalism on ADR inspired conflict management policies is probably best explained by the character of the US institutional context for addressing workplace disputes, an argument first developed in a path-breaking article by Colvin (2003b). In contrast to pretty much the rest of the Anglo-American world, it has never been considered appropriate in the USA to establish a body like an Employment Tribunal or Labour Court specifically to address legally-based employment disputes. In the absence of any specialized semi-judicial system, legally-based employment disputes are mostly handled by the normal civil court system. Superficially, this institutional peculiarity appears relatively innocuous, but in reality it has created big institutional incentives for organizations in the USA to develop ADR-based conflict management systems

Using the court system to vindicate employment rights in the USA is a very legalistic, costly and protracted affair (Colvin 2012). Yet despite being burdensome, a massive increase occurred in the number of employment-related legal cases going before the courts during the 1990s. Faced with an enlarged body of legally-based employment rights triggering more employment-related litigation cases with potentially costly implications,

employers had the incentive to try and escape this development. A circumvention strategy was not long in arriving. Large-scale organizations started writing employment contracts which required prospective employees to sign, as a condition of recruitment, a commitment to arbitrate alleged breaches of statutory rights and forgo their right to pursue their case in the courts. Considerable uncertainty existed about the legality of obliging potential employees to waive their right to use the courts to vindicate alleged breaches of employment law. However, this uncertainty was cleared up in 1991 when the USA Supreme Court ruled in the *Gilmer* case that it was legally permissible for organizations to ask employees to use arbitration to resolve legally-based employment disputes.

This decision gave employers the green light to develop employment contracts that contained binding arbitration clauses, thereby making it difficult for employees to use the courts to vindicate statutory employment rights (Lipsky et al. 2003). In the wake of the *Gilmer* decision, the number of employment contracts stipulating that employment disputes will be settled by arbitration increased significantly. But to be a credible alternative to litigation, organizations had to show that arrangements put in place to address workplace conflict were meaningful, comprehensive and easily accessed by employees. In effect, the *Gilmer case* created institutional incentives for organizations to develop conflict management systems, which for multiple country-specific reasons did not emerge in other parts of the Anglo-American world. Of course, it would be misleading to attribute the rise of ADR-based conflict management systems solely to the *Gilmer case*. Research suggests that organizations were prompted by other influences to develop conflict management systems. These range across a wide range of factors, including the need to upgrade

conventional dispute resolution practices to deal with mounting commercial pressures for higher organizational and individual performance and the demands of more educated and assertive employees (Avgar and Colvin 2016). As a result, the peculiar institutional context in the USA suggests that the proliferation of ADR-based conflict management systems in the country should be considered an example of American exceptionalism.

### **Conclusions**

Across the Anglo-American world, organizations have been exposed to a range of endogenous and exogenous influences that are encouraging them to rethink traditional conflict management practices. Exogenous influences include the decline of trade unions, a more educated and less deferential workforce, whereas endogenous influences include trade union substitution policies by some organizations and the greater use of performance management and team work that can cause conflict relating to inter-personal rivalries as well as harassment-based disputes to rise (Teague, Roche, Gormley and Currie 2015). Together these influences are encouraging more individualized forms of workplace conflict that are not easily resolved by traditional conflict management practices. Organizations cannot immunize themselves from these influences and thus some form of adjustment is likely to established conflict management practices.

This paper suggests that organizations in Ireland are not responding to these exogenous and endogenous pressures by diffusing sophisticated ADR-based conflict management practices, at least not on any coherent or systematic basis. For the most part, the pattern in Ireland is for firms to adopt reactive and piecemeal or evolutionary postures towards ADR

innovation, with only a small minority adopting more strategic approaches and even then usually not with the intention of creating conflict management systems. Other Anglo-American countries, apart from the USA, are tending to follow the Irish pattern. Only in the USA do we find organizations responding to the pressures for change by increasingly adopting a strategic approach to workplace conflict management. The result has been the diffusion of either significant stand-alone or closely aligned bundles of conflict management innovations. On occasions, the result has been the creation of conflict management systems that provide a full menu of choices to address workplace problems.

Thus, the USA is experiencing significantly greater levels of experimentation and innovation with regard to workplace conflict management than any other Anglo-American country. The pathway to workplace conflict management innovation unfolding in the USA is largely attributed to big country-specific institutional incentives that are encouraging the adaptation of organizational-based conflict management approaches aimed at preventing workplace disputes and problems turning into legal claims. No other Anglo-American country is experiencing similar institutional incentives and thus the pressure to introduce radical conflict management change is not evident. In Ireland, the incentives that exist in the US for employers to develop internal conflict management systems to lock complainants into conflict resolution within the organization, and so avoid the prospect of long delays, large damages and heavy costs, do not exist to anything like the same extent. If anything the institutional environment in Ireland encourages the slow and incremental adaptation of tried-and-tested workplace conflict management practices. As a result, the



adoption of ADR-based conflict management systems is seen a case of American exceptionalism.

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**Table 1 Data Sources and Methods of Data Collection**

<b>Methods</b>	<b>Roles of participants</b>	<b>Numbers</b>
<b><i>Telephone Interviews</i></b>		
Officers of Irish Business and Employers' Confederation	Provision of HR & IR Advice	4
Trade union officials	Representatives with experience of handling individual grievances and collective conflict	72
<b><i>Focus Groups</i></b>		
HR managers	Senior HR roles in organizations	19
Union officials	Representatives	7
Focus groups of mediators & facilitators	Private & public agency mediators & facilitators	11
Interviews with state & private facilitators	6 private facilitators; 8 Labour Relations Commission (LRC)/ Workplace Relations Commission (WRC) facilitators	14
<b><i>Case Studies</i></b>		
*Musgrave	HR managers(2) & line managers(2)	4
*Aramark Ireland	HR Managers	3
*Eircom (eir)	HR managers (2) and trade union officials (2)	4
Intel	Senior HR/legal manager, employee relations manager, operational line manager	3
Bus Éireann	HR managers	2
Health Service Executive (HSE)	HR managers (2) and trade union officials (2)	4
Central Bank		
HSE Dublin, North East	2 LRC facilitators; 2 HSE senior managers	4**
Communications with Senior Employment Lawyers	Experience of employment and commercial law, including the role of in-house counsel in employment grievances and disputes and ADR	4
Total		157

\* Cases reported in paper examining the 'evolutionary' approach to adopting ADR innovations.

\*\* Included in total above for interviews with facilitators.

**Table 2 Delays and Damages in Cases Involving Individual Employment Grievances**

Delays/Time taken to hear cases		
<i>US employment cases:</i>	minimum of 2 years before a case goes to trial	
<i>Cases at WRC:</i>	75% of cases heard in less than 6 months	
<i>Median awards in successful US employment litigation:</i>		
State courts:	\$176,000 (€147,000)	
Federal courts:	\$394,000 (€330,000)	
<i>Awards in Irish employment cases</i>		
Unfair dismissals	mean award	= \$18,320 (2015)
Breach of employment equality rights	mean award	= \$25,877 (2015)
	maximum award	= \$92,745 (2015)

Notes: US data from Colvin (2012). 2017 dollar exchange rates. Irish data from Annual Reports of Employment Appeals Tribunal and Equality Tribunal for 2015. Annual Report of the Workplace Relations Commission for 2016

**Table 3 Litigation and Lawyers in Anglo-American Countries**

	Lawsuits Filed Per 100,00 People	Lawyers Per 100,000 People
United States	5,806	380
Canada	1,450	292
Australia	1,542	259
New Zealand	1,337	273
UK	3,681	277
Ireland	2,754	373

## Notes:

Data for the UK pertain to court system and to numbers of barristers and solicitors in England and Wales. Data for the UK, New Zealand and Ireland omit numbers of cases in industrial /employment tribunals and courts and in special courts and tribunals (New Zealand) for comparability with courts data for other countries. Available data for New Zealand exclude cases resolved without proceeding to trial. Data for the UK, Ireland and New Zealand include data on numbers of barristers and solicitors.

## Sources:

Data for the US, Canada, UK and Australia from Raymseyer, J.M. and Rasmusen, E.B. (2010) 'Comparative Litigation Rates', Discussion Paper No. 681, John M. Ohlin Center for Law, Economics and Business, Harvard University. Data on numbers of lawyers derived from that provided in the text on p. 20. Data for Ireland on civil litigation obtained from *Annual Report of the Courts Service for 2016*. Data for Ireland on numbers of barristers and solicitors obtained from websites of the Council of Bars and Law Societies of Europe and the Law Society of Ireland. Data on civil litigation for New Zealand obtained from *District Court of New Zealand: Annual Report 2017*, *High Court of New Zealand: New Work in Civil Proceedings 2016*. Data include family court cases for comparability with data for other countries in the Table. Data on numbers of barristers and solicitors practicing in New Zealand obtained from website of the New Zealand Law Society.